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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 70

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JOHN E. MANNING, as Collector of Internal Revenue for the Fifth District of New Jersey,

Petitioner,

v.

SEELEY TUBE & BOX COMPANY, a corporation of the State of New Jersey,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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November 10, 1949.

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Respondent.

No. 70

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the District Court by Judge Smith (R. 5-10) is reported in 76 F. Supp. 937. The unanimous opinion of the Court of Appeals for the Third Circuit by Judge Goodrich (R. 13-17) is reported in 172 F. (2d) 77.

Jurisdiction

The judgment of the Court of Appeals was entered on December 20, 1948 (R. 12). By order of Mr. Justice Burton, dated March 5, 1949, the time within which a petition for a writ of certiorari might be filed was extended to and including May 18, 1949 (R. 18). The petition for a writ of certiorari was filed on May 12, 1949, and granted on June 27, 1949 (R. 20). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Question Presented

The Commissioner of Internal Revenue in 1943 assessed amounts as deficiencies in the 1941 income and excess profits taxes of the taxpayer (respondent), plus interest thereon, which amounts were never collected, paid or finally determined to be correct. The taxpayer's operating loss for 1943 resulted in a net operating loss carry-back deduction for 1941 (as provided in Sections 23(s) and 122(a) and (b) of the Internal Revenue Code) which was large enough to eliminate the taxpayer's net income for 1941. The Commissioner of Internal Revenue abated the tax deficiencies for 1941.

The question presented is whether the Collector (petitioner) is entitled to collect interest from the taxpayer upon such amounts assessed as deficiencies but finally determined by the Commissioner not to be payable and never collected.

Statutes Involved

The pertinent statutory provisions are printed in the Appendix to this brief.

Statement

The facts are not in dispute. Using round figures, they may be summarized as follows:

The taxpayer timely filed its 1941 returns and timely paid $44,900 in taxes on its income for 1941 in four equal quarterly installments (R. 2, 3). Thereafter, on July 7, 1943, it was adjudged a bankrupt and the Commissioner of Internal Revenue on August 2, 1943, pursuant to the provisions of Section 274(a) of the Internal Revenue Code (Appendix, p. iii), assessed deficiencies aggregating

$47,800 in taxes upon the taxpayer's income for 1941, plus interest thereon of $4,500 (R. 3). The amounts assessed as deficiencies were never paid (R. 6).

On March 3, 1944, the taxpayer timely filed its 1943 returns which disclosed a large net operating loss. It was agreed by the Commissioner of Internal Revenue and the taxpayer that the net operating loss for 1943 resulted, under the Internal Revenue Code, in a net operating loss deduction for the year 1941 sufficient to result in the taxpayer's not having any net income for 1941 (R. 4, 5).

On March 15, 1944, the taxpayer filed with the Collector claims for refund for the $44,900 in taxes on its 1941 income as shown upon its return and which it had paid (R. 4).

On February 9, 1945, the Commissioner of Internal Revenue abated the deficiencies in the amount of $47,800 which he had assessed in 1943 but never collected. He also at that time issued a certificate of overassessment with respect to the $44,900 of tax paid by the taxpayer upon its 1941 return. The Collector, however, refused to refund the entire amount of such $44,900 of tax, but refunded only $40,400 and retained the remainder, amounting to $4,500, as "interest" upon the "deficiencies" in tax of $47,800 which had been assessed in 1943, had never been collected or finally determined to be due, and which had been abated in 1945 (R. 5).*

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*As the Commissioner of Internal Revenue voluntarily abated the assessment of the deficiencies, the taxpayer did not have an opportunity to contest their correctness in Court (R. 5). The Collector is here asserting his claim for interest on those deficiencies by way of set-off or counterclaim against an amount of tax admittedly due to the taxpayer, and accordingly has the burden of proving that interest is due.

The question involved in this suit is whether, under the provisions of the Internal Revenue Code, interest may be collected upon an amount assessed as a "deficiency" in tax, but never collected because it is finally determined not to be payable.

The District Court (Smith, *J.*) held for the Collector (R. 5-10). The Court of Appeals reversed the District Court and, in a unanimous opinion by Judge Goodrich, held that where the "deficiency" could not be collected because it was not due, interest could not be collected (R. 13-17).

Summary of Argument

The Solicitor General takes the anomalous position that a taxpayer owes interest although admittedly he does not owe any tax. There is no authority in the Internal Revenue Code for such a contention. Interest cannot be collected on a non-existent debt.

Consistent administrative practice under the internal revenue laws for over thirty years has treated the liability for tax and interest as a single one; not as two liabilities, one for tax and one for interest. The only authority in the Code for the collection of interest is that it be collected "as a part of the tax" and when the tax is refunded any interest paid by the taxpayer thereon is also refunded. The Collector here disregarded both parts of that settled rule.

The Commissioner of Internal Revenue, in connection with the carry-back provisions of the Revenue Act of 1918, adopted the very position taken by the taxpayer here and ruled that where a tax deficiency which had been paid together with interest and penalties was wiped out by a carry-

back of loss, the tax, interest and penalties must be refunded. Thus the only published ruling of the Commissioner supports the taxpayer.

In determining a taxpayer's net income, a net operating loss deduction under Section 23(s) of the Code* is treated no differently than any other deduction provided for in the many subsections of Section 23. The Congressional mandate is that all such deductions "shall" be allowed in computing net income for a particular year (here 1941). No discretion is left to this Court or to any administrative official with respect to such allowance.

Not only has the Commissioner of Internal Revenue consistently ruled that the carry-back provisions operate *nunc pro tunc*, but the Congress has also recognized that fact in passing a 1945 amendment relating to the effect of those provisions. Moreover, deductions unallowable during a particular year, which later become allowable because of retroactive legislation, have consistently been held to be allowable *nunc pro tunc* by the Commissioner and the Courts. Any deficiencies in tax plus interest which were paid because of the disallowance of such deductions in prior years have been refunded to taxpayers in view of such subsequent retroactive legislation.

Section 3771(e), upon which the Solicitor General relies, is irrelevant to the instant case. That section does not entitle the Commissioner to *collect* interest *from* a taxpayer upon deficiencies in tax, but only relieves the Commissioner from *paying* interest *to* a taxpayer out of Government funds upon the refund of a tax payment. There may be a refund

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*All section references are to the Internal Revenue Code unless otherwise stated.

of tax without interest under Section 3771(e), but there cannot be a liability for interest where there is admittedly no liability for tax. A debt without interest is hardly as great a phenomenon as interest without a debt.

The carry-back deduction is an integral part of a determination of tax liability and is considered by the Courts in the determination of the proper tax liability of the earlier year. Thus the taxpayer's final 1941 tax liability could not be determined until recognition had been given to the net operating loss deduction arising from the carry-back from 1943 to 1941.

The fact situation of the instant case is not likely to arise very often. In only a few instances, of which a taxpayer in bankruptcy (like the present taxpayer) is one, is the Commissioner in a position to assess a tax deficiency for one year before the time when a carry-back of operating loss from a later year must be taken into account. In the normal situation a carry-back of operating loss is allowed at the same time as any other deduction permitted by law and the *assessment* of any deficiency upon which interest could be collected takes place only after all the relevant facts with respect to the carry-back are ascertained. The Solicitor General's position in this case discriminates against taxpayers against whom an immediate assessment of a tax deficiency is permitted (as in the instant case) prior to a judicial or other determination of the final tax liability for the year.

ARGUMENT

I. THE INTERNAL REVENUE CODE DOES NOT AUTHORIZE THE COLLECTION OF INTEREST IN THE ABSENCE OF TAX LIABILITY.

The taxpayer paid $44,900 as its tax for 1941. It was admittedly entitled to a refund of the full amount of that tax when the carry-back of its net operating loss from 1943 resulted in its having no net income for 1941 (R. 4, 7). Certificates of overassessment were issued in the full amount of the 1941 tax (R. 5, 7). The Collector, however, did not refund the full amount of the tax but withheld $4,500 and credited that amount against a like amount of interest which had been assessed as part of a tax deficiency assessment for 1941 which had been previously abated (R. 5, 7). Thus, the taxpayer has never recovered the total tax paid by it for 1941 despite the fact that the Collector recognizes that it had no tax liability whatever for 1941.

The Solicitor General takes the anomalous position that a taxpayer owes interest although admittedly he does not owe any tax. There is no authority in the Internal Revenue Code for such contention. Interest cannot be collected on a non-existent debt. It arises and becomes payable as part of the debt. If there is no debt, there can be no liability for interest.

The collection from taxpayers of interest is specifically covered by Section 292 (Appendix, p. iv) which provides that interest "upon the amount determined as a deficiency" shall be assessed at the same time as the deficiency "and shall be collected as a part of the tax". See also Section 294(b) (Appendix, p. v). Accordingly, the statute re-

stricts the collection of interest to a case where (1) there is a tax deficiency, and (2) that tax deficiency is collected.

Section 271(a) (Appendix, p. ii) defines a deficiency as "the amount by which the tax imposed" by law exceeds the amount shown as the tax by the taxpayer upon his return, with certain adjustments not here relevant. Since the Collector admits that "the tax imposed" for 1941 was zero, there was no deficiency in the taxpayer's tax which could call for the payment of interest.

Moreover, the assessed deficiency was never collected. The law requires that interest shall be "collected as a part of the tax". There could hardly be a clearer statutory expression of Congressional intent that where no tax deficiency exists and *none has been collected* interest may not be collected.

Since specific statutory provisions govern the collection of interest on tax, the Solicitor General cannot rely on analogies or common law rules making interest payable on debts in the absence of statute. *Standard Oil Co.* v. *United States,* 10 F. Supp. 550 (Ct. Cls., 1935), cert. den. 296 U. S. 597 (1935). See also *Western Union Telegraph Co.* v. *Priester,* 276 U. S. 252 (1928); *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907). In any event, the Collector necessarily fails here, under Code or common law, since admittedly there is no debt.

The Commissioner of Internal Revenue, in connection with an earlier Revenue Act, adopted the very position taken here by the taxpayer. Section 204(b) of the Revenue Act of 1918 (Appendix, p. xii) provided for a net loss carry-back. The Commissioner ruled that where a deficiency in 1918 tax had been wiped out by a 1919 loss carried back to 1918, that tax deficiency, together with interest

and penalties paid with respect to that deficiency, must be refunded to the taxpayer. L. O. 1115, II-2 C. B. 221 (1923). That ruling states that inasmuch as penalties and interest are considered as "a part of the tax" under the law for the purposes of assessment, collection and refund, the interest and penalties must be refunded as a part of the tax deficiency where it is wiped out by a carry-back. The Commissioner reached a similar conclusion in I. T. 1447, I-2 C. B. 220 (1922), which states that "interest and penalties are in the nature of accretions to the tax and should be considered as a part thereof in connection with any refund or credit of the tax." In other words, the settled administrative interpretation and practice has been directly contrary to the position newly taken here by the Solicitor General.

Similarly the Courts have long held that interest is an accretion to and part of the tax in connection with any refund or credit of the tax. As stated in *Big Diamond Mills Co.* v. *United States*, 51 F. (2d) 721 (C. C. A. 8th, 1931), tax and interest "constitute a single liability" and the Government does not have "two separate, independent claims; one for a tax; one for interest". *Phelps* v. *United States*, 105 F. (2d) 904 (C. C. A. 2nd, 1939), and *Colorado Milling & Elevator Co.* v. *Howbert*, 57 F. (2d) 769 (C. C. A. 10th, 1932), also hold that any interest paid by a taxpayer as a part of a tax deficiency assessment is refundable if it is later determined that the tax deficiency should be refunded.

There is no statute of limitations in the Code expressly applicable to the assessment, collection, and refund of interest. The doctrine that tax and interest constitute a single liability, however, has caused the Commissioner and the

Courts to apply the same statute of limitations to interest as to the tax itself. Otherwise a situation would arise as incongruous as that for which the Solicitor General here contends, and a tax liability or a tax refund might be barred by the statute of limitations, but a claim for interest would still be collectible.

Additional support for the taxpayer's position is found in the very procedure whereby the interest in this case was "collected" by the Collector. He credited the refund of tax admittedly due to the taxpayer against interest allegedly due from it. Section 322(a) (Appendix, p. vi) provides that the amount of any overpayment of tax shall be credited against any "*tax* or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer" (emphasis supplied). There is no authority in the Internal Revenue Code for the crediting of an overpayment of tax against *interest*, rather than against tax, except by reason of the well settled doctrine that "interest and penalties are in the nature of accretions to the tax and should be considered as a part thereof in connection with any refund or credit of the tax." L. O. 1115 and I. T. 1447, *supra*.

The Solicitor General devotes a considerable portion of his brief (pp. 19-28) to an involved argument based on the provisions of Section 3779 (Appendix, p. viii), which was added to the Code in 1945, whereby a taxpayer expecting an operating loss in a given year (1946, for example) may postpone the payment of his tax for the preceding year (1945). To the extent that the operating loss carry-back from 1946 eventually reduces his tax for 1944, he is only required to pay 3% interest on the extension of his 1945 tax. In the first place, that section concededly has no direct application to the case at bar. The Solicitor General quite obviously does not contend that Section 3779 *authorizes* the

collection of 6% interest in the instant case on the taxpayer's inchoate liability for 1941 tax since Section 3779 is not retroactive. He argues rather that Section 3779 is evidence of Congressional intent which is consistent with his position.

There is no substance to that argument. In general, Section 3779 merely authorizes a reduced rate of interest where an extension in the payment of tax for *one* year is compensated for by a reduction of tax in *another* year. In the absence of Section 3779, which provides for a 3% rate of interest, it is evident that a taxpayer could not extend the time for payment of his 1945 tax because of an expected reduction in his 1944 tax, without paying the 6% interest rate provided in Section 295 (Appendix, p. vi).*

Section 3779 relates only to extensions of time for the payment of tax shown by a taxpayer's return to be due. Otherwise there would be no need for an extension of time for payment. That section treats a taxpayer expecting a carry-back more considerately than an ordinary taxpayer. Section 295 is the relevant section in this field applicable to the year 1941. The Solicitor General does not cite it or rely on it. It is not apparent why he relies on Section 3779, which by its terms modifies the rule of Section 295 only for 1945 and later years.

To summarize, the Solicitor General, in order to support his position here, ignores the established practice of the Commissioner and the Bureau of Internal Revenue as well as judicial holdings that interest is an accretion to, and part of, the tax, and that where a tax is refunded, interest collected as a part thereof must necessarily also be refunded.

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*If the tax with respect to which the extension was granted is refunded, the interest imposed for the extension is also refunded under the settled administrative procedure above outlined in this brief.

If interest paid by a taxpayer on a tax deficiency must be refunded when the tax is refunded, what possible justification has the Solicitor General for asserting that interest may be collected on an abated tax deficiency assessment and in the absence of any tax liability? The statute clearly restricts the collection of interest to a case where a deficiency in tax exists. Where there is no tax liability whatever there is no basis for collecting interest. As was stated by the Court of Appeals below in holding for the taxpayer, the most there was in the instant case was an inchoate tax liability which disappeared in the final accounting when the taxpayer's actual 1941 tax liability was determined to be zero.

II. IN DETERMINING A TAXPAYER'S NET INCOME A NET OPERATING LOSS DEDUCTION IS TREATED NO DIFFERENTLY THAN ANY OTHER DEDUCTION.

In order to prevail in this case, the Solicitor General must take the position that Section 23 proclaims a different treatment for a deduction allowable under subsection 23(s) than it does for a deduction allowable under its many other subsections. Section 23 is the section of the Code prescribing the deductions which "shall be allowed" "in computing net income" for any year. Section 23(s) (Appendix, p. i) provides that in computing net income "there shall be allowed" for "any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122". Section 122(b)(1) (Appendix, p. i) in turn provides that "a net operating loss shall be a net operating loss carry-back". The mandatory word "shall" is used in both sections, which is the same language employed with respect to other deductions allowable in computing net income under Section 23, such as business expenses and interest. Of course, as the Solicitor General

says (Br., p. 29), deductions are a matter of legislative grace. It follows that once Congress, as a matter of legislative grace, has provided that a deduction "shall be allowed" for a particular year (here 1941), no discretion is left to this Court or to any administrative official with respect to such allowance.

The Commissioner of Internal Revenue has consistently ruled that the carry-back provisions of the internal revenue laws, whereby an operating loss in a later year becomes an operating loss deduction in an earlier year, operate *nunc pro tunc*. Such a deduction is to be treated as is any other deduction allowable for that earlier year.

He first took that position in respect of the net loss carry-back provided by Section 204(b) of the Revenue Act of 1918 (Appendix, p. xii), and ruled that where a deficiency in tax plus interest and fraud penalties for the year 1918 was wiped out by the carry-back to 1918 of a net loss suffered in 1919, not only should the deficiency be refunded to the taxpayer but also the interest and fraud penalty paid in connection therewith. L. O. 1115, II-2 C. B. 221 (1923), *supra*. Section 252 of the Revenue Act of 1918 (Appendix, p. xiii), which was the refund provision there involved, is in all material respects the same as the refund provision contained in Section 322(a). In other words, the only published ruling of the Commissioner in point is squarely contrary to the position taken by the Solicitor General in this proceeding and yet he has made no effort to explain why he has taken a position contrary to administrative practice.*

*This Court has frequently held that when the Congress enacts a Revenue Act, it is deemed to have adopted the interpretation which the Commissioner has placed upon the comparable provisions of earlier Revenue Acts and the administrative practice followed thereunder. *Crane* v. *Commissioner*, 331 U. S. 1 (1947), and cases therein cited.

Moreover, the Commissioner in his own Regulations under the carry-back provisions of the Code has reiterated the settled position that a carry-back operates *nunc pro tunc*. He requires the earlier year's net income to be recomputed under the carry-back so as to disallow certain deductions which are limited to a specified percentage of "net income". In T. D. 5498, 1946-1 C. B. 209, the following statement is made at Section 474.11:

> "Thus, any deduction limited, for example, by net income or adjusted gross income, such as the deduction for charitable contributions, is to be recomputed on the basis of the net income or adjusted gross income as affected by the carry-back."*

Again in a situation converse to that presented in the instant case, the Commissioner ruled that the carry-back applied *nunc pro tunc*, and Congress in amending the statute recognized that it so applied. That situation arose in connection with the unused excess profits credit carry-back provided by Section 710(c)(3)(A) (Appendix, p. vi). There, for example, if a taxpayer corporation had an unused excess profits credit for 1944 which was carried back to the year 1942, the effect was to reduce the excess profits tax payable but at the same time to increase the income tax payable. Under those circumstances, the Commissioner ruled that interest upon the deficiency *caused* by the carry-

*For example, if a corporate taxpayer had net income shown on its return for 1941 of $100,000 and had deducted $5,000 for charitable contributions in that year under the 5% limitation provision of Section 23(q) and then had a net operating loss of $90,000 in 1943 which, by reason of the carry-back, became an additional deduction in 1941, the Commissioner would compel it to reduce its deductions for charitable contributions to 5% of the net income figure of $10,000 after applying the carry-back, namely, $500.

back ran from the payment date for the tax of the earlier year. In recognizing that interest on a tax deficiency arising out of a carry-back ran from the payment date for the tax of the earlier year, the Commissioner took a position directly contrary to that now being urged by the Solicitor General in the instant case, since interest could run from that date only if the carry-back was effective as of that date. The Congress recognized that such was the proper construction of the statute, saying in the Report of the Ways and Means Committee on the Tax Adjustment Act of 1945 (Report No. 849, 79th Cong., 1st Sess., p. 33):

> "Interest on such deficiency, under the present law, is payable from the date prescribed for payment of the tax or, if the tax is paid in installments, the date prescribed for payment of the first installment."

In order to correct that situation, the Congress, by Section 6(a) of the Tax Adjustment Act of 1945, 59 Stat. 517, added Section 292(c) to the Code (Appendix, p. v) which specifically provided that if a deficiency in tax is caused by a carry-back, then no interest shall be payable upon the deficiency except for such period as the Commissioner of Internal Revenue shall be required to pay interest on an overpayment caused by a carry-back pursuant to Section 3771(e) (Appendix, p. vii), *i.e.*, from the date of filing of the claim for refund of the overpayment.

Further indication that deductions which arise in later years are to be treated in all respects in the same manner as are deductions fully determinable in the prior year is to be found in the practice of the Commissioner with respect to retroactive amendments to the Internal Revenue Code. In recent years the Congress has enacted many retroactive amendments permitting deductions to be taken which would

not have been proper deductions in the year to which they were, by reason of the retroactive amendment, applied. For example, Section 23(a)(2), providing for the deduction of non-business expenses, was added by Section 121 of the Revenue Act of 1942, which amendment was applicable to all prior years. Until that amendment was enacted, such deductions were not allowable. *Higgins* v. *Commissioner*, 312 U. S. 212 (1941). The Courts have nevertheless held, and the Commissioner of Internal Revenue has apparently agreed, that such a retroactive deduction is to be treated as if it had been permitted under the law in force in the earlier year and, therefore, deficiencies which had been paid with interest under the law in force in earlier years are refundable, *together with interest*. *Spear* v. *Gagne*, 49 F. Supp. 263 (D. N. H., 1943). See also *Kimbrell* v. *Dallman*, 80 F. Supp. 695 (S. D. Ill., 1948); *Higgins* v. *United States*, 75 F. Supp. 252 (Ct. Cls., 1948).

The same result has been reached in cases involving the retroactive application of the tax benefit rule to all prior years by Section 22(b)(12), added by Section 116 of the Revenue Act of 1942. Prior to the enactment of the 1942 Act, the tax benefit rule was not applicable. *Commissioner* v. *United States & International Securities Corp.*, 130 F. (2d) 894 (C. C. A. 3rd, 1942); *Helvering* v. *State-Planters Bank & Trust Co.*, 130 F. (2d) 44 (C. C. A. 4th, 1942). However, any deficiencies *plus interest* paid for prior years which were wiped out by the application of that retroactive provision are refundable, together with interest. *Zion's Savings Bank & Trust Co.* v. *Korth*, 56 F. Supp. 519 (D. Utah, 1944), affirmed 148 F. (2d) 170 (C. C. A. 10th, 1945). See also *Fairbanks, Morse & Co.* v. *Harrison*, 63 F. Supp. 495 (N. D. Ill., 1945).

To summarize, the Internal Revenue Code, at Section 23(s), specifically provides that a net operating loss deduction is to be treated as is any other deduction in determining a taxpayer's net income. The Commissioner has ruled in an identical case that the deduction is not distinguishable from the other deductions provided by Section 23, and the Congress has stated that a carry-back adjustment is to be fully taken into effect in determining the tax liability of the year in which the deduction is taken. Many situations have arisen under the Code where the existence or the amount of a deduction is not known for several years subsequent to the filing of a return or the payment of a tax but, nevertheless, the deduction is treated as if it had been allowable in the prior year under the law then in effect. The general rule that interest collected as a part of a tax deficiency must be refunded when the deficiency itself is refunded is not changed in any way because the deduction is not known at the time the return is filed and arises because of subsequent events. The settled judicial and administrative procedure in like cases is thus squarely contrary to the Solicitor General's contentions here. That long-established practice should not be upset, particularly when no cogent reasons are urged for the reversal of the established rule.

III. SECTION 3771(e) OF THE CODE IS IRRELEVANT TO THE INSTANT CASE.

The Collector is claiming that the taxpayer *owes* him interest upon a tax which *would have* been payable *but for* the deduction provided by Section 23(s). The Solicitor General attempts to support that claim by citing an irrelevant section of the Code, Section 3771(e) (Appendix, p. vii), which provides that the Commissioner of Internal Revenue

does not have to *pay* interest from Government funds on a refund of tax attributable to a carry-back of loss for any period before the filing of a claim for refund thereof. The purpose of that section, as stated in the Congressional Committee Reports quoted by the Solicitor General in his brief, was to speed up the filing of refund claims by taxpayers so that the Government might be apprised of the amount of the claims against it. Indeed, the section is a tacit admission that, except for its provisions, the Commissioner would have to *pay* interest *to a taxpayer* from Government funds for a period beginning with the payment of the tax for the earlier year. There is no correlative provision in Section 292, which deals with interest to be paid *by* taxpayers *to the Government* on deficiencies in tax. Examples of the non-correlation of the deficiency and refund provisions of the Code are numerous. A few of them are outlined in the footnote.*

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*(1) The interest upon a deficiency in tax runs from the due date for the payment of the *first* installment of tax (Section 292(a)), whereas the interest payable upon a refund of tax under Section 3771(a) runs only from the date of payment of the last installment of the tax. *Blair* v. *Birkenstock*, 271 U. S. 348 (1926). There thus may be a gap of nine months or more between the dates upon which interest on a *deficiency* and interest on a *refund* would begin to run.

(2) Prior to 1945, interest upon a deficiency caused by a carry-back ran from the original due date of the tax for the earlier year, whereas under Section 3771(e) interest upon a refund attributable to a carry-back did not run until the filing of a claim for refund therefor. The Congress corrected this situation by statute when it enacted Section 292(c), *supra*, p. 15, in 1945.

(3) The statute of limitations with respect to assessments of *deficiencies* in tax, contained in Section 275, has always been separate and distinct from the statute of limitations with respect to claims for *refund* of overpayments of tax which is contained in Section 322. An extension of the statute of limitations for

Why it should follow from the fact that the Commissioner *does not* have to *pay* interest *to* the taxpayer, that the Commissioner should be able to *collect* interest *from* the taxpayer, is not apparent either from the Solicitor General's brief or otherwise. The argument that because I do not owe you interest, I have a right to collect interest from you is an obvious *non-sequitur*. Moreover, a refund of a tax without interest (Section 3771(e)) is hardly as great a phenomenon as the payment of interest upon a non-existent tax liability.*

To summarize, the deficiency provisions of the internal revenue laws have always been separate and distinct from the refund provisions. Interest on a deficiency and interest on a refund normally run for different periods. Any correlation between the two sets of Code provisions has been made by Congressional amendments to the law and not by the Courts.

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assessment did not extend the statute of limitations for refund until an express statutory provision to that effect was put into the Code in 1942. Section 322(b)(3), added to the Code by Section 169(a) of the Revenue Act of 1942.

(4) Section 311(b) provides that the statute of limitations for *assessment* of tax against a transferee of a taxpayer shall expire one year after the expiration of the statute of limitations for assessment against the taxpayer. There is, however, no correlative provision in Section 322 relating to the statute of limitations for *refund*, and the Congressional Committees have been considering a provision to correlate the deficiency and the refund provisions in that regard. See Section 148 of H. R. 6712, the Revenue Revision Bill of 1948, as passed by the House of Representatives on June 19, 1948.

*" 'All right', said the Cat; and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.

" 'Well! I've often seen a cat without a grin', thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in all my life!' " Lewis Carroll, *Alice in Wonderland*, Chapter VI.

IV. A CARRY-BACK DEDUCTION IS AN INTEGRAL PART OF THE DETERMINATION OF TAX LIABILITY.

The Solicitor General does not, and indeed he cannot, argue that the final tax liability for any year is to be determined without reference to the net operating loss deduction. Section 23(s) specifically provides that such a deduction shall be allowed and, therefore, must be taken into account in determining the year's tax liability. The Courts have held that a carry-back from a subsequent year is to be considered in the determination of the proper tax liability of the prior year or years. *Gorman Lumber Sales Co.*, 12 T. C. 1184 (1949); *Acampo Winery & Distilleries, Inc.*, 7 T. C. 629 (1946), acquiesced in by the Commissioner, 1949 I. R. B. No. 11, p. 1; *Wier Long Leaf Lumber Co.* v. *Commissioner*, 173 F. (2d) 549 (C. A. 5th, 1949), affirming on this issue 9 T. C. 990 (1947). Furthermore, Section 272(g) provides that the Tax Court "shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of" the tax liability of the year before it.

Thus, the taxpayer's final 1941 tax liability could not be determined until recognition had been given to the net operating loss deduction which arose out of 1943. The potential deficiency or inchoate liability for 1941 tax wiped out by the carry-back deduction was rendered non-existent and any liability for interest assessed as part of such tax was also completely extinguished.

V. A REVERSAL OF THE DECISION OF THE COURT OF APPEALS WOULD RESULT IN INEQUITIES AS BETWEEN TAXPAYERS.

In the normal situation the Commissioner of Internal Revenue is forbidden by law to assess a deficiency in tax

until he has given the taxpayer an opportunity to have his tax completely redetermined and the carry-back of loss taken into account in such determination by The Tax Court of the United States. Section 272(a) (Appendix, p. ii). The Tax Court will, in the proceeding before it, determine the operating loss deduction under Section 23(s) which is caused by a carry-back from a subsequent year, and its decision will be that (1) there is no deficiency for the year, or (2) there is a deficiency for the year *after* application of the carry-back, or (3) there is an overpayment for the year. *Gorman Lumber Sales Co.*, 12 T. C. 1184 (1949), *supra; Acampo Winery & Distilleries, Inc.*, 7 T. C. 629 (1946), *supra; Wier Long Leaf Lumber Co.* v. *Commissioner*, 173 F. (2d) 549 (C. A. 5th, 1949), *supra.*

Thus in the usual case the Commissioner can never *assess* a deficiency plus interest of the character upon which he bases his claim here. Thus, there is normally no assessment to be wiped out by the carry-back. The Solicitor General makes no argument in his brief that the Collector could collect interest in the absence of an assessment. There is clearly no provision authorizing any such collection procedure. On the contrary, the Solicitor General urges this Court to sustain him in his position on the ground that the Commissioner *did* make an *assessment* of a deficiency in this case.

The Solicitor General's position in this case discriminates against taxpayers against whom, for some reason such as bankruptcy as in the instant case (where the taxpayer presumably is in dire need of funds), the Commissioner is permitted to make an immediate assessment of a tax deficiency under Section 274(a) (Appendix, p. iii)

without allowing any prior judicial determination of liability. His position also means different treatment for taxpayers depending upon whether their returns are promptly audited or whether there is a delay in audit until the amount of the carry-back loss has been determined so that no deficiency would ever be assessed.

The Solicitor General also states that a decision in favor of the taxpayer will create great difficulties for the Government because "irresponsible and unscrupulous" taxpayers will file patently incorrect returns in the hope that penalties and interest will be wiped out by a carry-back of a loss occurring *two years later* (Br., p. 28). We have already shown that on the contrary the adoption of the Solicitor General's contentions will cause the Commissioner much greater difficulties in upsetting established and long continued administrative practice, approved by the Courts. Moreover, the provisions of the Code prescribing penalties for filing a negligent return (5% of tax under Section 293(a)) or a fraudulent return (50% of tax under Section 293(b)) plus the criminal penalties for filing a fraudulent return (fine and imprisonment under Section 145) have proved to be ample safeguards against "irresponsible and unscrupulous" taxpayers. Finally there is no suggestion that this taxpayer was irresponsible or unscrupulous.

Summary

The Solicitor General's argument in this case to the effect that tax and interest do not constitute a single liability, and that interest may be due when the tax is not, is contrary to the long-established administrative practice as embodied in the published rulings of the Commissioner and in Court decisions over the past thirty years or more. A

decision in favor of the Collector in this case would be contrary to the express terms of the Internal Revenue Code, would create confusion in other situations, and would result in inequities as between taxpayers.*

CONCLUSION

THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT SHOULD BE AFFIRMED.

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November 10, 1949.

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*The instant case involves a taxpayer in bankruptcy, one of the few types of taxpayers against which an assessment of a tax deficiency can be made, without the taxpayer's written consent, before a determination of the carry-back has occurred. To add further to the uniqueness of the instant case, the assessment, although made, was never collected. It would be interesting to know what percentage of the approximately 58,600 cases referred to in the petition for certiorari (pp. 6-7) and the Solicitor General's brief (p. 11n) actually do involve the fact situation presented in this case. We believe it is fair to say that the instant fact situation would be unlikely to arise in more than a very small percentage of those cases.

APPENDIX

Internal Revenue Code, 53 Stat. Part I, 26 U. S. C.:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

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(s) *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * * * * *

Sec. 122. NET OPERATING LOSS DEDUCTION.

(a) [As amended by Sec. 105(e)(3)(A) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [As amended by Sec. 153(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Amount of Carry-Back and Carry-Over.*—

(1) *Net Operating Loss Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net

operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * * * * *

(e) [As amended by Sec. 153(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *No Carry-Back to Year Prior to 1941.*—As used in this section, the term "preceding taxable year" and the term "preceding taxable years" do not include any taxable year beginning prior to January 1, 1941.

* * * * * * * *

Sec. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax;

* * * * * * * *

Sec. 272 [As amended by Sec. 168(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] PROCEDURE IN GENERAL.

(a)(1) *Petition to Board of Tax Appeals.*—*If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed

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*The Revenue Act of 1942 changed the name of the Board of Tax Appeals to The Tax Court of the United States.

(not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

* * * * * * * *

Sec. 274. BANKRUPTCY AND RECEIVERSHIPS.

(a) *Immediate Assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner

in respect of a tax imposed by this chapter upon such taxpayer shall, despite the restrictions imposed by section 272(a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

* * * * * * * *

Sec. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the

thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

* * * * * * * *

(c) [As added by Sec. 6(a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] *Deficiency Resulting From Carry-Back and Related Matters.*—If any part of a deficiency is determined by the Commissioner to be attributable (A) to a carry-back to which an overpayment described in section 3771(e), or a decrease determined under section 3780(b), in any other tax is attributable, or (B) to an error in the amount or effect of a carry-back which resulted in a credit or refund of an overpayment with interest computed pursuant to section 3771(e), or in a decrease determined under section 3780(b), no interest shall be assessed or paid under subsection (a) with respect to such part of the deficiency for any period during which interest was not allowed with respect to such overpayment or for a period prior to the application of such decrease.

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Sec. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

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(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on

or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

* * * * * * * *

SEC. 295. TIME EXTENDED FOR PAYMENT OF TAX SHOWN ON RETURN.

If the time for payment of the amount determined as the tax by the taxpayer, or any installment thereof, is extended under the authority of section 56 (c), there shall be collected as a part of such amount, interest thereon at the rate of 6 per centum per annum from the date when such payment should have been made if no extension had been granted, until the expiration of the period of the extension.

* * * * * * * *

SEC. 322. [As amended by Sec. 172(e) of the Revenue Act of 1942, c. 619, 56 Stat. 798] REFUNDS AND CREDITS.

(a) *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * * * * *

SEC. 710. IMPOSITION OF TAX.

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(c) [As added by Sec. 2(b) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and amended by Sec. 204 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Unused Excess Profits Credit Adjustment.*

* * * * * * * *

(3) *Amount of Unused Excess Profits Credit Carry-Back and Carry-Over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b)(1).

* * * * * * * *

Sec. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

* * * * * * * *

(e) [As added by Section 153(d) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Claims Based on Carry-Back of Loss or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part

of the overpayment or the filing of a petition with the Board, whichever is earlier.

* * * * * * * *

Sec. 3779. [As added by Sec. 4(a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] EXTENSIONS OF TIME FOR PAYMENT OF TAXES BY CORPORATIONS EXPECTING CARRY-BACKS.

(a) *In General.*—If a corporation, in any taxable year ending on or after September 30, 1945, files with the collector a statement, as provided in subsection (b), with respect to an expected net operating loss carry-back or unused excess profits credit carry-back from such taxable year, the time for payment of all or part of any tax imposed by chapter 1 or 2 for the taxable year immediately preceding such taxable year shall be extended, to the extent and subject to the conditions and limitations hereinafter provided in this section.

(b) *Contents of Statement.*—The statement with respect to an expected carry-back referred to in subsection (a) of this section shall be sworn to in the manner prescribed by section 52 in the case of a return and shall be filed at such time and in such manner and form as the Commissioner, with the approval of the Secretary, may by regulations prescribe. Such statement shall set forth that the corporation expects to have a net operating loss carry-back, as provided in section 122(b), or an unused excess profits credit carry-back, as provided in section 710(c)(3), from the taxable year in which such statement is made, and shall set forth, in such detail and with such supporting data and explanation as such regulations shall require—

(1) the estimated amount of the expected net operating loss or unused excess profits credit;

(2) the reasons, facts, and circumstances which cause the corporation to expect such net operating loss or unused excess profits credit;

(3) the amount of the reduction, attributable to the expected carry-back, in the aggregate of the taxes previously determined for all taxable years affected by the carry-back prior to the taxable year of the expected loss or unused credit; such taxes previously determined being ascertained in accordance with the method prescribed in section 3801 (d); and such reduction being determined by applying the expected carry-back in the manner provided by law to the items on the basis of which such taxes were determined but such reduction being decreased by the amount of any credits under section 780 properly allocable to such reduction;

(4) the tax or taxes and the amount thereof the time for payment of which is to be extended; and

(5) such other information for the purpose of carrying out the provisions of this section as may be required by such regulations.

The collector shall, upon request, furnish a receipt for any statement filed, which shall set forth the date of such filing.

(c) *Amount to Which Extension Relates and Installment Payments.*—The amount the time for payment of which may be extended under subsection (a) with respect to any tax shall not exceed the amount of such tax shown on the return, increased by any amount assessed as a deficiency (or as interest or additions to the tax) prior to the date of filing the statement and decreased by any amount paid or required to be paid prior to the date of such filing, and the total amount of the taxes the time for payment of which may be extended shall not exceed the amount stated under clause (3) of subsection (b). For the purposes of this subsection, an amount shall not be considered as re-

quired to be paid unless shown on the return or assessed as a deficiency (or as interest or addition to the tax), and an amount assessed as a deficiency (or as interest or additions to the tax) shall be considered to be required to be paid prior to the date of filing of the statement if the tenth day after notice and demand for its payment occurs prior to such date. If an extension of time under this section relates to only a part of a tax, the time for payment of the remainder shall be considered to be the dates on which payments would have been required if such remainder had been the tax and the taxpayer had elected to pay the tax in four equal installments as provided in section 56 (b).

(d) *Period of Extension.*—The extension of time for payment provided in this section shall expire—

(1) on the last day of the month in which falls the last date prescribed by law (including any extension of time granted the taxpayer) for the filing of the return for the taxable year of the expected net operating loss or unusued excess profits credit, or

(2) if an application for tentative carry-back adjustment provided in section 3780 with respect to such loss or unused credit is filed before the expiration of the period prescribed in clause (1) on the date on which notice is mailed by registered mail by the Commissioner to the taxpayer that such application is allowed or disallowed in whole or in part.

(e) *Revised Statements.* — Each statement filed under subsection (a) with respect to any taxable year shall be in lieu of the last statement previously filed with respect to such year. If the amount the time for payment of which is extended under a statement filed is less than the amount under the last statement previously filed the extension of time shall be terminated as to the difference between the two amounts.

(f) *Termination by Commissioner.*—The Commissioner is not required to make any examination of the statement, but he may make such examination thereof as he deems necessary and practicable. The Commissioner shall terminate the extension as to any part of the amount to which it relates which he deems should be terminated because, upon such examination, he believes that, as of the time such examination is made, all or any part of the statement clearly is in a material respect erroneous or unreasonable.

(g) *Payments on Termination.*—If an extension of time is terminated under subsection (e) or (f) with respect to any amount, then—

(1) no further extension of time shall be made under this section with respect to such amount, and

(2) the time for payment of such amount shall be considered to be the dates on which payments would have been required if there had been no extension with respect to such amount and the taxpayer had elected to pay the tax in four equal installments as provided in section 56(b).

(h) *Jeopardy.*—If the Commissioner believes that collection of the amount to which an extension under this section relates is in jeopardy, he shall immediately terminate such extension and notice and demand shall be made by the collector for payment of such amount.

(i) *Interest.*—In the case of an amount the time for payment of which has been extended, there shall be collected as part of such amount interest from the dates on which payments would have been required if there had been no extension and the taxpayer had elected to pay the tax in four equal installments as provided in section 56(b)—

(1) upon so much of such amount as is satisfied under Section 3780(b) by applying or crediting

thereto, within the period of extension, a decrease in tax determined in connection with an application under section 3780(a), interest at the rate of 3 per centum per annum to the date of such satisfaction, except that on so much of such satisfied amount as is not in excess of the amount of the deficiencies assessed under section 3780(b) and which is not so satisfied, the rate shall be 6 per centum per annum; and

(2) upon the remainder of the amount the time for payment of which has been extended, interest at the rate of 6 per centum per annum to the date such amount is paid.

If the Commissioner determines that during the period of extension credit or refund of an overpayment has been allowed or made, or a deficiency assessed, affecting the amount to which the extension relates and that the taxpayer could not have taken such overpayment or deficiency into account in the statement or a revised statement, appropriate adjustment shall be made in the interest.

Revenue Act of 1918, 40 Stat. 1057, c. 18:

Sec. 204.

* * * * * * * *

(b) If for any taxable year beginning after October 31, 1918, and ending prior to January 1, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount of such net loss shall under regulations prescribed by the Commissioner with the approval of the Secretary be deducted from the net income of the taxpayer for the preceding taxable year; and the taxes imposed by this title and by Title III for such preceding taxable year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis

of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. If such net loss is in excess of the net income for such preceding taxable year, the amount of such excess shall under regulations prescribed by the Commissioner with the approval of the Secretary be allowed as a deduction in computing the net income for the succeeding taxable year.

* * * * * * * *

Sec. 252.

That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.